



**The Comptroller General  
of the United States**

Washington, D.C. 20548

## Decision

**Matter of:** Bautech, Inc.  
**File:** B-232766  
**Date:** January 25, 1989

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### DIGEST

1. Contracting agency is under no obligation to eliminate an advantage which a firm may enjoy because of its particular circumstances, including the award of a prior contract by the government, where protester neither alleges nor shows that advantage resulted from unfair action on the part of the government.
2. Protest that dates for receipt of initial and best and final offers allowed insufficient time for preparation of proposals is dismissed as untimely when not filed prior to the closing date for the receipt of proposals.

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### DECISION

Bautech, Inc. protests the award of a contract to Building System Design, Inc. (BSD), under request for proposals (RFP) No. DACW21-88-R-0276, issued by the Army Corps of Engineers. Bautech principally alleges that the agency has afforded BSD an unfair competitive advantage in the course of this procurement.

We deny the protest in part and dismiss it in part.

By way of background, the agency, for several years, had been using a computer-based version of its construction cost estimating system, "CACES." This system was slow, required access to a mainframe computer located in Winchester, Virginia, and required specialized computer knowledge that limited the number of potential users. In 1986, the agency awarded a sole-source contract to BSD to adapt the CACES system for use on microcomputers, in a manner similar to BSD's commercial cost-estimating system "Composer Plus." The agency found that the program that resulted represented a system far superior to the old one. For this reason, the agency decided to provide an upgraded version of the program

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for use by all Corps elements and supported agencies. Although the agency considered awarding a sole-source contract to BSD to provide this system, the Corps decided to offer other firms a chance to propose other software that might also meet the Corps' needs.

Accordingly, the agency issued the solicitation on July 5, 1988, seeking proposals for a requirements contract for software, site licenses and support services to institute a Micro-Computer Aided Cost Estimating System (M-CACES) at its subordinate offices. The RFP required delivery of a program "with the equivalent functionality" of BSD's Composer Plus;" furthermore, the solicitation provided that award would be based on an integrated assessment of all proposals and that although cost would be considered, technical capability would be of paramount importance.

Three offerors responded by August 4, the closing date for receipt of initial proposals. On September 2, the agency advised each offeror of deficiencies and questions noted by agency technical evaluators in reviewing the proposals, and invited submission of revised proposals and best and final offers (BAFO) by September 12, 1988. On September 21, the agency advised offerors of its intention to award a contract to BSD. This protest followed.

Bautech objects to the allegedly unfair advantage enjoyed by BSD as a result of the sole-source award made to BSD in 1986, the agency's assistance to BSD in adapting CACES for microcomputer use, as well as the agency's efforts to promote Composer Plus throughout the Corps.

We have held that the government is under no obligation to eliminate an advantage which a firm may enjoy because of its particular circumstances, including the award of other contracts by the government, unless the advantage has resulted from unfair action on the part of the government. Bethlehem Steel Corp., et al., B-231923, B-231923.2, Nov. 3, 1988, 88-2 CPD ¶ 438. Beyond its argument that the past award to BSD was part of a pattern of unfair behavior, the protester has presented no evidence that BSD's advantage resulted from unfair action by the government. In this regard, the protester alleges that in the course of performing this contract, BSD obtained information and assistance from the agency not available to other offerors and complains of the agency "promot[ing]" the use of Composer Plus throughout the Corps. The awardee denies receiving any nonpublic information from the agency. The agency states that only routine assistance was given BSD under its prior contract by the agency's project manager "to carry out the contract." The protester has presented no

evidence otherwise. Further, while the agency admits that Composer Plus was demonstrated in training sessions as an example of "future enhancements to automated construction cost estimating," it denies any effort to promote use of the specific software. From the record before us, we find no basis to conclude that BSD's advantages in the current procurement resulted from unfair action by the agency.

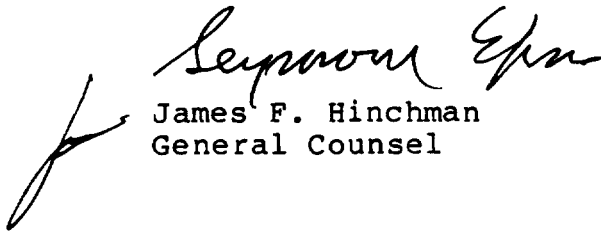
Regarding the technical evaluation, Bautech also argues that the agency's favorable evaluation of BSD's offer of Composer Plus was irrational because Composer Plus is a mixture of D-base II and C language routines that is neither efficient nor practical for the long-term, but will ultimately require major changes to meet all RFP requirements. The protester calls the agency finding that there were no disadvantages in BSD's proposal "unbelievable" because "no one is perfect."

The agency must bear the burden of any difficulties incurred by reason of a defective evaluation; it is not our position to question an agency's technical evaluation where the protester has not demonstrated that it was clearly unreasonable. The protester's disagreement with the evaluation does not establish that the evaluation was clearly unreasonable. Transportation Research Corp., B-231914, Sept. 27, 1988, 88-2 CPD ¶ 290. The record shows that Composer Plus, contrary to the protester's assertions, is not a mixture of D-base II and C language but is a compiled program (a program independent of all other software of the user's computer). Further, we have reviewed the RFP, the proposals and the technical evaluation and find it not at all unbelievable that an offer of Composer Plus, in response to a specification calling for Composer Plus or its functional equivalent, could be found to contain no disadvantages. There is nothing in the record to suggest otherwise.

In its protest, Bautech also raises questions about the long-term stability of BSD, both its financial health and its dependence on certain key personnel, whose death or retirement, the protester argues, could prevent BSD from performing. Whether BSD is capable of performance is a question of its responsibility as a prospective contractor; the agency has found BSD to be responsible, and our Office will not review such an affirmative responsibility determination absent a showing of possible fraud or bad faith or an alleged failure to apply definitive responsibility criteria. 4 C.F.R. § 21.3(m)(5) (1988); Masscomp, B-232012, Aug. 19, 1988, 88-2 CPD ¶ 165. The protester has made no such showing.

The remainder of Bautech's protest is clearly untimely. Under our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1), protests based upon alleged improprieties in a solicitation which are apparent prior to the closing date for receipt of proposals must be filed prior to the closing date for receipt of proposals. Bautech's additional ground for protest that the time for submitting initial proposals and BAFOs was too short, filed after all proposals had been submitted, and after the agency had announced its award decision, is therefore untimely. Lane Roofing Co., Inc., B-232273, Sept. 1, 1988, 88-2 CPD ¶ 206.

The protest is denied in part and dismissed in part.



James F. Hinchman  
General Counsel